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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RYAN SHAWN JOSHUA Defendant and Appellant.	G054730 (Super. Ct. No. 16NF2166) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, A. Natasha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

Ryan Shawn Joshua appeals from a judgment after a jury found him guilty of assault with a deadly weapon and found true a great bodily injury allegation. Joshua argues the trial court improperly excluded a statement the victim allegedly made to hospital staff that challenged the credibility of the victim's identification of him. We disagree and affirm the judgment.

FACTS

Late one evening, Officer Jerman Alvarez responded to a report of a man, later identified as the victim, stumbling and possibly bleeding on the street. Alvarez first saw the victim on the ground near the intersection of La Palma Parkway and Anaheim Boulevard in Anaheim near the Salvation Army store. The victim held his side and tried to stand up. The victim had blood on his face, a laceration to his back, and another laceration on the front of his chest, and he appeared to have been bleeding.

Alvarez observed what looked like bloodstains at the Salvation Army parking lot. The Salvation Army store is located to the north of the La Palma Park and is a known gathering spot for local transients. Alvarez estimated approximately 30 to 40 transients lived at La Palma Park on any given evening.

The victim initially described his attackers as men who were blacks and Mexicans. He later described the man with the knife as a light skinned black man who walked with a limp and wore a checkered shirt. When asked how many people were involved, he asserted "[they] all were black." The victim did not know the names of the men who assaulted him but said "they all go by stupid-ass names." He described the knife as a folding knife and a "Big 5 knife."

Officer John Yoo responded to the scene shortly after Alvarez. Yoo interviewed Derek MacArthur, a local transient who was present in the Salvation Army parking lot. MacArthur described witnessing a black man who appeared to be in his 30s arguing with a white man because the white man had slept with the black man's wife. MacArthur said he saw the black man "beat-down" the white man, knocking him to the

ground and rendering him unconscious. The white man eventually got up and stumbled towards Anaheim Boulevard.

Officer Matthew Bradley also responded to the incident. He overheard a suspect description broadcast over the police radio. The suspect was described as an African-American male wearing a "Pendleton" (a plaid shirt) walking with a limp, which was the description provided by the victim. A few minutes after overhearing the broadcast, Bradley was driving westbound on La Palma Avenue from Anaheim Boulevard when he saw a man that matched the suspect's description walking east on the north sidewalk of La Palma Avenue. Bradley stopped the man, who was later identified as Joshua. Sergeants Mike Fernandez and James Cossin arrived to assist Officer Bradley. Fernandez performed a pat-down search on Joshua and did not locate a weapon. The officers searched the area but did not find a weapon.

At the police station, Officer Mike Williams advised Joshua of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and questioned him. Williams observed Joshua's right hand was swollen and that he walked with a limp. Joshua explained he was in a car accident when he was younger and sustained nerve damage to the right side of his body, which caused him to walk with a limp. Joshua admitted he had been homeless, lived in La Palma Park, and knew several of the local transients there. Joshua first told Williams he was headed from his girlfriend's home to his mother's home, which was roughly five miles away, when he was stopped by law enforcement. He denied being inside La Palma Park at any time during his travel. After being told he had been identified by witnesses at the scene, including the victim, he admitted he went into the park to drink from the water fountain. Joshua denied being anywhere near the Salvation Army and denied being in any type of altercation.

No DNA foreign to the victim was found on the victim's clothing. But DNA testing revealed a spot of the victim's blood on the back of Joshua's pant leg. The

prosecution's forensic scientist acknowledged that secondary transfer of blood evidence was possible.

At the hospital, the victim was treated for his wounds. According to the treating physician, the victim sustained two lacerations to his left chest that were consistent with wounds inflicted by a knife. As a result of the wounds, the victim had a collapsed lung. A collection of blood was observed within his chest cavity. The treating physician opined that without medical care the victim could have died as a result of his injuries. A blood test revealed the presence of alcohol and a urine test revealed the presence of amphetamines in the victim's system.

An information amended by interlineation charged Joshua with attempted murder (Pen. Code, §§ 664 subd. (a), 187 subd. (a) (count 1)), and assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1) (count 2)). The information alleged he personally used a deadly weapon (Pen. Code, § 12022, subd. (b)(l)), and inflicted great bodily injury (GBI) (Pen. Code, §12022.7, subd. (a)). The information also alleged he suffered a prior strike conviction (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), a prior serious felony (Pen. Code, § 667, subd. (a)(1)), and a prison prior (Pen. Code, § 667.5, subd. (b).) The court granted Joshua's motion to bifurcate the prior convictions, and he waived his right to a jury trial on those allegations.

At trial, the victim did not testify. MacArthur denied observing a fight and explained that he merely repeated to police what someone else had told him. MacArthur testified he did not observe a weapon.

Joshua sought to introduce a portion of the victim's medical record under the business records exception to the hearsay rule. The defense explained the victim had been admitted to the hospital on August 2, 2016, but self-discharged at 3:00 a.m. on August 5, 2016. He returned to the emergency room at UCI Medical Center at 4:30 p.m.

that day requesting pain medication and explaining that he had left the hospital because he had observed the person who had stabbed him in the lobby.[1]

The prosecution objected to admission of this evidence and argued the medical record did not meet the qualifications of the business records exception in Evidence Code[2] section 1271. The prosecution asserted the affidavit presented with the record did not address the sources of the information and the trustworthiness of the sources, and the statement was double hearsay for which there was no exception for its admission into evidence. The prosecution alternatively argued that if the court were to admit the medical record, the prosecution should be allowed to introduce a six-pack photographic line-up where the victim circled Joshua's picture and wrote, "'this is the fucker that stabbed me.'"

The court ruled the proffered medical record was inadmissible because there was no proper foundation for the entry of the record pursuant to section 1561. Specifically, the affidavit did not comply with section 1561's requirement the affidavit describe the mode of preparation. The court also ruled that even if the medical record was properly authenticated, the statements the defense sought to admit were inadmissible as it was hearsay without an exception.

The defense inquired if the six-pack photographic line-up where the victim circled Joshua's picture was also excluded. The prosecution indicated, in light of the court's ruling on the medical record, it would not seek to introduce the photographic line-up identification.

The jury acquitted Joshua of count 1, but convicted him of count 2, and found true the GBI enhancement. At a bench trial, the court found the prior convictions

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[1] Although not spelled out in the record, we infer Joshua was in custody and could not have been in the hospital when the victim claims to have seen the perpetrator.

[2] All further statutory references are to the Evidence Code.

true beyond a reasonable doubt. The court sentenced Joshua to six years for count 2, three years for the GBI enhancement, and five years for the serious felony for a total of 14 years in prison.

DISCUSSION

Joshua argues the trial court prejudicially abused its discretion and violated his federal constitutional rights by excluding medical record information that would have impeached the credibility of the victim's identification. The medical record contained a statement from the victim that he had seen the perpetrator at the hospital several days after the incident. Joshua claims this information was admissible under the business records or public record exceptions to the hearsay rule or under the prior inconsistent statement exception.

Joshua claims the record was properly authenticated under section 1561 and admissible because it was produced to the court via subpoena issued by the prosecution and was accompanied by an affidavit from the custodian executed under penalty of perjury. Therefore, he asserts the court erred by not admitting the record under either the business record or public record exceptions. Additionally, he argues the court erred in finding no hearsay exception existed to permit admission of the victim's statement.

The Attorney General argues there was no error and maintains Joshua forfeited his claim the victim's medical record should have been admitted under section 1280 as a public record because he failed to raise that theory of admissibility below. He also argues Joshua forfeited any claim of federal constitutional error because he failed to raise that argument below. Without deciding the issue of forfeiture, we will address Joshua's claims on the merits because he also argues his counsel provided ineffective assistance of counsel for failing to assert these arguments.

After finding the affidavit insufficient, the court ruled that even if the affidavit was sufficient, it would exclude the medical record as hearsay without an exception. Thus, the decisive question is, assuming the affidavit was sufficient, whether

the medical record was admissible under the business records, public records, or inconsistent statement exceptions. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. (*People v. Merriman* (2014) 60 Cal.4th 1, 65.)

The portion of the record the defense sought to introduce was the victim's statement he had seen the perpetrator in the hospital lobby. That statement is a hearsay statement by the victim offered for the truth—namely, that the victim had seen the perpetrator in the lobby.

Hearsay is evidence of an out-of-court statement offered to prove the truth of its contents. (*People v Masters* (2016) 62 Cal.4th 1019, 1055.) Hearsay is inadmissible unless it comes within an exception to the hearsay rule. (*Ibid*., § 1200, subd. (b).) Multiple hearsay is admissible if each layer falls within an exception to the hearsay rule. (*People v. Anderson* (2018) 5 Cal.5th 372, 403; § 1201.)

Joshua asserts this hearsay statement was admissible either under the business records exception in section 1271 or under the public records exception in section 1280. He also claims the statement was admissible under the inconsistent statement exception in section 1202. We will address each theory of admissibility.

I. Business Records Exception

Section 1271 provides "[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule" if it meets all of the following requirements: "(a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

"The object of . . . section 1271 is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead.

[Citations.]" (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1451.) "'Whether a particular business record is admissible as an exception to the hearsay rule . . . depends upon the "trustworthiness" of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record.' [Citations.]" (*People v. Matthews* (1991) 229 Cal.App.3d 930, 939.) "The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission." (*People v. Williams* (1973) 36 Cal.App.3d 262, 275.) "[T]he party offering the evidence, bore the burden of establishing the foundational requirement of trustworthiness. [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) "A trial court has broad discretion in determining whether a sufficient foundation has been laid to qualify evidence as a business record. On appeal, we will reverse a trial court's ruling on such a foundational question only if the court clearly abused its discretion." (*Ibid*.)

Inadmissible hearsay is not transformed into admissible evidence simply because it is entered into a business record. "'When multiple hearsay is offered, an exception for *each* level of hearsay must be found in order for the evidence to be admissible. [Citations.]" (*People v. Ayers* (2005) 125 Cal.App.4th 988, 995.) The mere fact a document qualifies as a business or official record does not mean everything in the record is admissible. The exception does not make admissible that which would be inadmissible if the person making the record was called as a witness and examined concerning it in court. (*Hutton v. Brookside Hospital* (1963) 213 Cal.App.2d 350, 355.)

We conclude the statement contained within the medical record that Joshua sought to admit was inadmissible. The employee who recorded the statement could not permissibly have testified to the victim's statement. The employee had no personal knowledge as to the victim's observations. Although the employee may have accurately recorded the victim's statement, the employee had no basis upon which to guarantee the trustworthiness of the content of the victim's statement.

II. Public Records Exception

Section 1280 provides, "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness." The purpose of this hearsay exception is to eliminate the calling of each witness involved in the record's preparation and instead substitute the record of the transaction. (*People v. Nelson* (2012) 209 Cal.App.4th 698, 708.)

"'[I]n addition to the statutory requirements, the courts have imposed some conditions relative to the admissibility of a public record: (a) the record must be made by an official pursuant to governmental duty; [citations], and, (b) the record must be based upon the observation of an informant having a duty to observe and report. [Citation.] In this regard, a record based on the statements of third parties, e.g., an auto accident report compiled by the police, is inadmissible. [Citation.]' [Citations.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177.)

Under the public records exception, trustworthiness cannot be established where the source of information was not a public employee with a duty to either observe facts correctly or report observations accurately. (*People v. Baeske* (1976) 58 Cal.App.3d 775, 780-781.) Here, the source of the information was the victim because he alone made the observation. The public employee made no personal observation. The public employee simply entered the hearsay statement of the victim as to what the victim said he observed. A statement made by a third party is not made admissible simply because it is repeated in a public record. The victim's statement lacked the requisite trustworthiness necessary to qualify under the public records exception to the hearsay rule.

III. Inconsistent Statement Exception

Section 1202 provides, in part, as follows: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing."

Relying on *People v. Corella* (2004) 122 Cal.App.4th 461 (*Corella*), Joshua asserts the second level of hearsay could be overcome because the statement was inconsistent and would have impeached the victim's prior identification. In *Corella*, the victim told a 911 operator defendant, her husband, had hit her. (*Id*. at p. 464.) At the preliminary hearing, the victim recanted, and she did not testify at trial. (*Id*. at p. 469.) The trial court allowed the prosecution to admit the victim's statements to the 911 operator, but did not permit the victim's preliminary hearing testimony. (*Id*. at p. 470.) On appeal, defendant argued the victim's statements at the preliminary hearing were admissible under section 1202. (*Ibid*.) The *Corella* court agreed, finding it was error to exclude the victim's preliminary hearing testimony because it contradicted her earlier statement to the 911 operator. (*Id*. at pp. 470-472.) We find *Corella* inapt.

Here, the victim did not testify, but unlike in *Corella*, his prior identification was not introduced. The prosecution indicated it would only offer the victim's identification of Joshua in the six-pack photographic line-up if the court admitted the victim's statement in the hospital record. When the court did not admit that evidence, the prosecution indicated it would not seek to introduce the photographic identification.

The only hearsay statement relative to the identification of the perpetrator was a description given by the victim when Alvarez contacted him. The victim described

his attacker as a light skinned black man who walked with a limp and wore a checkered shirt. The hospital record statement simply indicated the victim had seen his attacker in the lobby. That statement is not inconsistent with the description the victim gave to Alvarez. No description of the individual the victim saw in the lobby was included in the hospital record. Therefore, there was no basis for impeachment and section 1202 is not applicable.

Having found the court did not err by excluding the statement Joshua sought to admit, there is no basis for Joshua's claim his federal constitutional rights were violated. Because we address the merits of his claims, we need not address his assertion he received ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.